

June 17, 2013

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On Thursday, June 13, 2013, representatives of leading organizations with members in the healthcare, financial services, higher education, transportation, insurance, and technology sectors, as well as the general business community, met with Priscilla Argeris from Commissioner Rosenworcel's office to discuss the pending Communication Innovators ("CI") Petition for Declaratory Ruling ("Petition") regarding the non-telemarketing use of predictive dialers under the Telephone Consumer Protection Act ("TCPA"). The representatives included:

- Virginia O'Neill, Senior Counsel, Center for Regulatory Compliance, American Bankers Association;
- Celia Winslow, Manager, Legal and Regulatory Affairs, American Financial Services Association;
- Mike Zagami, Associate, Miller/Wenhold Capitol Strategies, LLC, on behalf of the American Association of Healthcare Administrative Management;
- Wes Huffman, Director of Research and Communications, Washington Partners, LLC, on behalf of the Coalition of Higher Education Assistance Organizations;
- Shelly Repp, President, National Council of Higher Education Resources;
- Anne Gross, Vice President, Regulatory Affairs, National Association of College and University Business Officers; and
- Michele Farquhar and Mark Brennan, Hogan Lovells US LLP, on behalf of CI.

During the meeting, the representatives encouraged the Commission to grant the CI Petition and address the widespread confusion – and resulting harmful class action litigation – regarding whether predictive dialers that lack the statutorily required ability to store, produce, and dial random or sequential numbers are "automatic telephone dialing systems" ("autodialers") under the TCPA.

They explained that there are dozens of detailed examples where predictive dialer solutions are used today to ensure compliance with federal and state laws and to place critical, time-sensitive non-telemarketing calls to benefit consumers, including:

- **Healthcare.** Appointment reminders, follow-up appointment and exam scheduling, pre-operative instruction calls, prescription reminders, lab result discussions, post-discharge follow-up communications intended to prevent readmission, home healthcare instructions
- **Financial Services.** Identity theft and fraud prevention alerts, breach notifications, out-of-pattern activity alerts, customer service and general account notifications, funds transfer confirmations, anticipatory fee avoidance calls (including low balance, overdraft, over-the-limit, and late payment alerts), outreach calls to help customers avoid mortgage default and explore mortgage modification options, calls to consumers behind on other credit obligations to explore alternative payment options and avoid fraudulent for-profit debt settlement companies
- **Education.** Student correspondence, class registration and cancellation alerts, financial aid communications, missed payment and pre-default correspondence, school or building closing notifications
- **Transportation.** Flight delay or cancellation notifications
- **Insurance.** Impending policy lapse notifications, notifications of imminent catastrophe, calls with information about how and where to file a claim
- **Other Consumer Protection and Safety Calls.** Product recalls, disaster relief resources, notifications for utility outages and upcoming service interruptions

As demonstrated by these examples, today's predictive dialer solutions promote consumer-friendly calling practices and allow businesses with a legitimate need to contact large numbers of specific customers for non-telemarketing purposes to do so accurately, efficiently, and cost-effectively while complying with federal and state consumer protection laws. They connect live representatives with consumers as quickly as possible to provide timely, useful information. For example, ABA notes that a leading credit card issuer uses predictive dialer technologies to place more than one million "out of pattern" calls regarding suspicious activity each month. In addition, the card issuer places more than five million calls annually to advise customers that a replacement card has been sent to them.

Importantly, predictive dialers also facilitate compliance with federal and state laws. For example, mortgage servicers attempting to provide more affordable mortgage payments under the Home Affordable Modification Program are required to make "reasonable efforts" to reach out to borrowers, including, *inter alia*, making a minimum of four telephone calls to the last known telephone numbers of record, at different times of the day, over at least 30 days.¹ Moreover, under the Consumer Financial Protection Bureau's mortgage servicing rules, mortgage servicers must establish, or make good faith efforts to establish, *live contact* with borrowers by the 36th day of their delinquency and promptly inform such borrowers, where appropriate, that loss mitigation options may be available.²

¹ See Home Affordable Modification Program – Borrower Outreach and Communication, Supplement Directive 10-02, U.S. Treasury, 2 (Mar. 24, 2010), *available at* https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf.

² See Summary of the Final Mortgage Servicing Rules, Consumer Financial Protection Bureau, 4 (Jan. 17, 2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf.

As another example, Section 605A of the Fair Credit Reporting Act provides consumers with a right to place fraud alerts on their credit reporting agency files. After the alert is placed, financial institutions must verify the consumer's identity before establishing any new credit plan or extension of credit. Section 605A expressly *directs* financial institutions to call consumers to conduct this verification.³

Section 501(b) of the Gramm-Leach-Bliley Act, as well as the breach notification laws of 46 states and the District of Columbia, require financial institutions to establish response and customer notification programs following any unauthorized access to customers' personal information.⁴ Predictive dialer technologies permit banks to quickly contact large numbers of customers to alert them to threatened security breaches, enabling customers to monitor their accounts and take appropriate defensive action. They can also be used to place the many calls required to help affected customers with the resolution of fraudulent charges.

In the healthcare sector, under the Affordable Care Act, an insurance exchange must make a "reasonable effort" to contact all applicants who provide information to the exchange that is inconsistent with the information maintained in official records.⁵ The same act also specifically grants federal and state health and human services programs the authority to make notifications of "eligibility, recertification, and other needed communication regarding eligibility" by placing calls to a patient's or client's wireless telephone number.⁶

Predictive dialers are also used to assist student loan borrowers who are having difficulties in repaying their loans. In some cases, telephone contact is required by federal law. For example, under the Federal Family Education Loan Program, lenders of federally guaranteed loans must "engage in at least four diligent efforts" to contact a delinquent borrower by telephone.⁷

These non-telemarketing calls must be made to wireless telephone numbers in order to reach increasingly large segments of the population. For example, more than one-third (35.8%) of all American homes are wireless-only households, and another 15.9% of households receive all or almost all calls on wireless telephones despite also having a landline telephone.⁸ In addition, approximately 60% of 25-29 year-olds and 51% of 30-34 year-olds live in wireless-only households.⁹

The representatives also confirmed that callers using predictive dialers to place non-telemarketing calls have no need for or incentive to call random or sequential numbers. Instead, they use predictive dialer solutions and other new technologies to place calls to specific individuals

³ 15 U.S.C. § 1681c-1.

⁴ Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338 § 501(b); *see also, e.g.*, Cal. Civ. Code § 1798.29; Fla. Stat. § 817.5681; 815 ILCS § 530/10(a); NY CLS Gen. Bus. § 899-aa; N.C. Gen. Stat. § 75-65; Rev. Code Wash. § 19.255.010.

⁵ The Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 1411(e)(4)(a)(i).

⁶ *Id.* § 3021(b)(6).

⁷ See 34 C.F.R. § 682.411(d) (for borrowers that are delinquent by more than 15 days). As an example of TCPA litigation in the student loan context, *see Arthur v. Sallie Mae Inc.*, Case No. C10-0198JLR (W.D. Wash. 2010).

⁸ *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2012*, Center for Disease Control (rel. Dec. 19, 2012), *available at* <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.pdf>.

⁹ *Id.*

and for specific informational purposes. Moreover, because non-telemarketing calls such as those mentioned above are already authorized under the TCPA, granting the CI Petition would affect only the mechanics of how these calls are made, not whether the calls are made at all or the number of calls made.

Today's predictive dialer solutions are also exponentially more efficient than manual dialing. As Noble Systems Corporation discussed in its comments, modern predictive dialers can enable live callers to spend up to approximately four times as much time speaking directly with consumers.¹⁰ This data is consistent with other studies highlighting the efficiency and productivity benefits of predictive dialers.

The representatives explained that a grant of the CI Petition is urgently needed because of significant confusion by courts over the Commission's prior TCPA decisions regarding the applicability of the TCPA to predictive dialers. Specifically, some courts are now interpreting the Commission's prior TCPA rulings to mean that all predictive dialers are "autodialers" even if they do not meet the statutory definition of an "autodialer." As a result, companies are being sued in TCPA class actions and are facing potentially devastating penalties just for using predictive dialers or other new technologies. More than 500 TCPA cases have already been filed in court this year (nearly double the number of cases filed during the same period a year ago), with many involving allegations of predictive dialer use. The representatives stated that the specter of continued (and increasing) litigation is causing some of their members to consider whether to stop placing many of the beneficial non-telemarketing calls mentioned above.

The Commission can resolve much of this litigation by clarifying that a predictive dialer solution that does not meet the statutory requirements of an "autodialer" is not an "autodialer." To provide meaningful relief, however, the Commission must specifically clarify the scope of the term "autodialer" under the TCPA. For example, clarifying the meaning of "prior express consent" instead of clarifying the term "autodialer" will provide no protection against opportunistic TCPA plaintiffs and will instead encourage further unnecessary litigation and increase costs to consumers, undermining the TCPA's consumer protection goals.

In addition, any clarification must remain consistent with the statutory text of and legislative intent behind the TCPA – including by giving meaning to the phrase "using a random or sequential number generator."¹¹ It must also remain consistent with the FCC's longstanding precedent that the autodialer restriction "clearly" does not apply "to functions like 'speed dialing,' 'call forwarding,'" and other services where "the numbers called are not generated in a random or sequential fashion."¹² Any approach that fails to give effect to these elements would not only be contrary to law but extremely harmful to consumers, as it would sweep in all kinds of electronics, including smartphones and many software- or cloud-based services where no "equipment" is being used, under the definition of "autodialer."

Any clarification of the term "capacity" must also be consistent with the TCPA's text and underlying Congressional intent. Specifically, the autodialer restriction only applies to equipment that "has the capacity" to store or produce, and dial, randomly or sequentially generated numbers. It does not extend to equipment – or software – that *could be modified* to provide such capacity.

¹⁰ Comments of Noble Systems Corporation in Support of the Communication Innovators Petition for Declaratory Ruling, CG Docket No. 02-278, 3-4 (filed Nov. 15, 2012).

¹¹ See 47 U.S.C. § 227(a)(1).

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 47 (1992).

Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

Mark W. Brennan
Counsel to Communication Innovators
mark.brennan@hoganlovells.com
D 1+ 202 637 6409

cc: Priscilla Argeris